313 U.S. 567

Office - Supreme Court, U. S.
FILED
MAR 15 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

WALTER J. MATTISON,
City Attorney,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for a writ of certiorari	1
A. Summary statement of the matter involved	1
B. Reasons relied on for the allowance of the writ	7
Prayer for writ	9
Brief in support of petition for writ of certiorari	11
I. The opinion of the court below	11
II. Jurisdiction	11
III. Statement of case	16
IV. Opinion below	16
V. Specifications of errors	17
Argument	17
Summary of argument	17
Point A. Judgment of Supreme Court of Wisconsin rendered without a trial upon the issue of fact in trial court deprives petitioner of its property without due process of law	19
Point B. Issue upon which Wisconsin Supreme Court decided case was not raised at trial	20
Point C. Conceded and stipulated at trial that issue was reasonable value of services	22
Point D. Consumer of public utility should pay reasonable value for services rendered where after termination of formal contract utility cannot change rate	24
Point E. After termination of a contract rate a consumer who demands and accepts service having enjoined an increase in rates, is liable for the reasonable value thereof	25
Point F. A municipally owned water utility is entitled to reasonable compensation for services rendered	28
Conclusion	30

Table of Cases Cited.

	Page
Baltimore, etc. R. Co. v. *Resley*, 14 Md. 424	22
Board of Public Utility Com'rs. v. *N. Y. Tel. Co.*, 271 U. S. 23, 70 L. Ed. 808	29
Carlson v. *Washington*, 234 U. S. 103, 58 L. Ed. 1237	20
Creswill v. *Grand Lodge, K. P. of Georgia*, 225 U. S. 246, 56 L. Ed. 1074	19
Helis v. *Ward*, 308 U. S. 365, 84 L. Ed. 327	19
Herro v. *Heating & Plumbing F. Corp.*, 206 Wis. 256	20
Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S. 278, 57 L. Ed. 510	15, 29
Hulbert v. *Chicago*, 202 U. S. 275, 50 L. Ed. 1026	15
Interstate Amusement Co. v. *Albert*, 239 U. S. 560, 60 L. Ed. 439	20
Kilbourn City v. *Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499	16, 25
Lisbon Town Fire Ins. Co. v. *Tracy*, 296 N. W. 126	20
Lutcher & Moore Lumber Co. v. *William H. Knight, et al.*, 217 U. S. 257, 54 L. Ed. 757	15, 19, 24
Marshall & Ilsley Bank v. *Voight*, 214 Wis. 27	20
Milwaukee v. *Railroad Commission*, 217 Wis. 606	26
Milwaukee v. *West Allis*, 217 Wis. 614	4, 22, 25
Milwaukee v. *West Allis*, 294 N. W. 625	16
Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 74 L. Ed. 870	15
Moffat Tunnel Improvement Dist. v. *Boynton*, 287 U. S. 620, 77 L. Ed. 538	15
North Carolina R. Co. v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591	19
Pabst Corporation v. *Milwaukee*, 190 Wis. 349	28
Pacific Gas & Electric Co. v. *San Francisco*, 265 U. S. 403, 68 L. Ed. 1075	29
People ex rel. Arthur, et al. Fire Com'rs. v. *Huntington Water Works Co.*, 203 N. Y. S. 808	28
People ex rel. City of New York v. *Queens County Water Co.*, 232 N. Y. 377, 133 N. E. 889	28
Quarles v. *City of Appleton*, 299 F. 508	25, 28

Page

Saunders v. *Shaw*, 244 U. S. 317, 61 L. Ed. 1163, 25, 19, 20, 24, 29
Sittig v. *Birkenstack*, 35 Md. 273 22
Smith v. *Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. Ed. 255 29
Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674 . 16, 24
Staten Island Water Supply Co. v. *City of New York*, 128 N. Y. S. 1028 28
Timson v. *Manufacturers' Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565 21
United States v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 46 L. Ed. 619 ..... 15, 19
Ward v. *Goetz*, 33 Cal. App. 595, 165 P. 1022 22
Willing v. *Binenstock*, 302 U. S. 272, 82 L. Ed. 248 .. 19
Wisconsin Power & Light Co. v. *Beloit*, 215 Wis. 439 . 21
Woodring v. *Clarksburg-Columbus Short Route Bridge Co.*, 301 U. S. 679, 81 L. Ed. 1338 16

WISCONSIN STATUTES AND LAWS CITED.

Section 196.19 ..... 2, 7, 8, 13, 14, 15, 22, 28
Section 196.20 ..... 2, 7, 8,13, 14, 15, 22, 26, 27, 28
Section 196.22 ..... 2, 7, 8, 13, 14, 15, 22, 27, 28
Section 251.264 13
Section 251.41 13
Chapter 183, Laws of 1931 27
Chapter 183, Sec. 2, Laws of 1931 22
Chapter 196 28

WISCONSIN SUPREME COURT RULES CITED.

Rule 10 13
Rule 37 ..... 12, 13
Rule 41 13

U. S. CONSTITUTION AND U. S. STATUTES CITED.

14th Amendment, Constitution 7, 8, 14, 15
Section 237 (b), Judicial Code as amended by Act of Feb. 13, 1925 and March 8, 1934 11
28 U. S. C. A. Sec. 344 (b) 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States,—

MAY IT PLEASE THE COURT:

The petition of City of Milwaukee respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Petitioner is a municipal corporation of the State of Wisconsin and owns and operates a water works plant and furnishes, sells, distributes and supplies water to its inhabitants, various suburbs, and others. Respondent, a municipal corporation of the State of Wisconsin, is a suburb

of petitioner. Petitioner furnished and supplied the water in the litigation to respondent, which, as the owner and the operator of its distribution system, used or sold the same to its consumers.

Petitioner on October 9, 1935, commenced an action against respondent to recover the sum of $283,097.18 with interest. This was the difference between the amounts paid by respondent at the rate of six cents per hundred cubic feet for water furnished to it by petitioner from January 1, 1930 to April 4, 1935, and the amounts claimed by petitioner to be the reasonable value of the services rendered, to-wit, at the rate of ten cents per hundred cubic feet of water furnished from January 1, 1930 to June 30, 1932, and at the rate of nine cents per hundred cubic feet from July 1, 1932 to April 4, 1935. Respondent answered to the complaint. By supplemental complaint the water furnished up to and including the quarter ending June 30, 1939, was included in the action. The action was tried to the court, a jury having been waived.

A judgment was entered in favor of the petitioner on November 20, 1939, for the sum of $546,124.15, which judgment was based upon the trial court's findings of fact and conclusions of law.

The judgment was reversed by the Wisconsin Supreme Court on November 8, 1940, and is reported in 294 N. W. 625, upon the ground that petitioner had not filed a schedule of rates as to respondent for water furnished after January 1, 1930. This issue was not presented nor tried below, the case having been tried on the basis of reasonable value. The Wisconsin Supreme Court construed Sections 196.19 (1), 196.20 (2) and 196.22, Wisconsin Statutes, as applicable in this case. Petitioner's motion for rehearing upon the decision was denied by the Wisconsin Supreme Court on January 7, 1941.

The action was to recover the reasonable value over six cents per hundred cubic feet which respondent had paid for the service rendered by petitioner to respondent in supplying it with water since January 1, 1930 (R. 1-6).

In 1905 a contract was entered into between the parties whereby petitioner was to furnish respondent with water for a compensation of six cents per hundred cubic feet, and the latter, then a village, was to distribute the water to its inhabitants and charge the consumers therefor (Ex. 58, 59; R. 517, 523). In 1926 petitioner filed with the then Railroad Commission of Wisconsin a schedule of rates whereby consumers outside the city of Milwaukee were to pay ten cents per hundred cubic feet, and this schedule was approved by the Commission (Ex. 14A; R. 329). Respondent paid petitioner at the contract rate of six cents ever since the making of the contract and continued such payment to and for the quarter ending June 30, 1939 (Ex. 91; C. R. 2720).*

On October 25, 1926, the common council of the petitioner adopted a resolution by which it declared the contract to be terminated as of January 1, 1930. A copy of the resolution with a notice was served upon respondent on January 18, 1927 (Ex. E; R. 404).

On August 27, 1928, petitioner sued respondent to recover the difference between the six cents paid and the ten cent rate fixed for outside users, and respondent in 1929 sued petitioner to enjoin it from cutting off its supply of water (R. 468) and from collecting any other amount than the six cents per hundred cubic feet rate provided for in the contract. On December 28, 1929, an injunctional order was issued, among other things, enjoining petitioner from shutting off the water and from doing any act or thing which

---

* "C. R." references are to the certified transcript on file in the Clerk's Office.

directly or indirectly would affect the present status existing between the parties until the hearing and final determination of the action. Petitioner kept billing respondent for water furnished at the ten cent rate and applying the six cent payments on account to July 1, 1932, when petitioner voluntarily reduced the rate to outside users to nine cents per hundred cubic feet for any purpose, and billed respondent at that rate, and this rate was approved by the Commission as to outside users (Ex. 14A; R. 329).

In the action of the petitioner to collect the difference, judgment was entered in favor of respondent. In the injunctional suit, judgment was entered in favor of respondent, and petitioner was enjoined from changing the contract rate of six cents and from shutting off the water. Both judgments were entered, after trial, on February 28, 1934. Petitioner appealed. The judgment in its case was affirmed and the judgment in the respondent's case was reversed on April 2, 1935, as reported in 217 Wis. 614, 258 N. W. 851, 259 N. W. 724. It was held that the contract was terminated as of January 1, 1930, and that the contract rate governed only to that time; that the order dated December 9, 1926, of the Railroad Commission, approving the rate schedule, did not apply to consumers who were being furnished under contract; that the petitioner in a proper action would be limited to recovery, if established, upon the basis of *quantum meruit,* over and above the amount paid; and that the petitioner could not cut off the service to respondent.

As a result of the mandate of the State Supreme Court which vacated the injunction which had enjoined petitioner from changing the six cent rate, petitioner was able to and did on April 4, 1935 (Ex. 14A; R. 329) file with the Railroad Commission the water rate to be charged respondent, nine cents per hundred cubic feet, being the rate which was charged to water consumers for water furnished outside of Milwaukee in the absence of a specific contract.

This action is to recover that excess upon the basis of reasonable value. As of June 30, 1939, that difference amounted, the trial court found (R. 42-43), to $409,648.74 and interest.

At the trial, petitioner (R. 468-469) offered and it was received (R. 469) into evidence the record in the injunctional case, in support of its contention that because of the injunction petitioner was entitled to recover the reasonable value of the service. Counsel for respondent stated that "that question has all been determined res judicata so far as this action is concerned," and that he "didn't consider that question was open because of the Supreme Court decision, so I am not going to argue that with" petitioner's trial counsel, to which the latter said "all right," and the trial upon the issue of reasonable value proceeded. Upon the last day of the trial (R. 470-471) respondent's counsel stated that in the absence of any rate established by the Public Service Commission being in effect the amount of the recovery would turn upon the reasonable value of the service.

The trial court found (R. 38) that the reasonable value of the service rendered by the petitioner to respondent, with all allowances deemed fair made in respondent's favor, was the following:

1. From January 1, 1930, to July 1, 1932..... 10 cents
2. From July 1, 1932 to December 31, 1935.... 8½ cents
3. From January 1, 1936 to the meter reading for the quarter ending June 30, 1939..... 8 cents

(per 100 cubic feet)

Petitioner's evidence showed that the reasonable value of the services rendered from January 1, 1930 to July 1, 1932, was ten cents per hundred cubic feet, and for that from July 1, 1932 to and including the meter reading for

the quarter ending June 30, 1939, was nine cents per hundred cubic feet, because:

A. Those were the rates paid by the most similar consumers in the neighborhood—West Milwaukee;

B. Milwaukee consumers paid seven cents and six cents, adding to that a differential of three cents for the cost services rendered which, in Milwaukee, are assumed by the taxpayers;

C. The cost of the services rendered exceed ten cents and nine cents; thus, considering the entire system, the average was between 10.9¢ and 12.2¢ (Ex. 29; R. 343); and considering high service, the average was between 10¢ and 11.2¢ (Ex. 90; R. 387);

D. The cost of getting water from the pumping stations to respondent in 1934 by a single 36 inch main would have been 10.4¢ and by a 30 inch main and a 24 inch main, 11.8¢ (Ex. 35; R. 358);

E. The average cost to all consumers by dividing the total allowable revenue by the amount of water sold was 9.1¢ to which a differential to outside consumers would have to be added;

F. The unit cost for respondent for another supply, deep well and softening plant, up to the distribution system would have been 12.4¢ (Ex. 75; R. 368);

G. Opinion of experts of 10¢ and 9¢.

Under the well established rule of the State Supreme Court—*Graham* v. *Zellers,* 205 Wis. 542—there was sufficient credible evidence to support the findings of the trial court.

Respondent appealed from the judgment. Upon such appeal a change was made in respondent's attorneys. For

the first time, there was presented, by way of argument in the West Allis brief, the contention that the Milwaukee utility not having filed a specific schedule of rates applicable to West Allis from January 1, 1930, was prohibited by Wisconsin Statutes (Sections 196.19, 196.20 and 196.22) from recovering for the services rendered and included in the action (West Allis Brief on Appeal, pp. 15-24) (R. 472-478). Petitioner in its brief on appeal, pp. 93-101 (R. 478-483), contended that that issue had not been presented, heard or passed upon by the trial court; that West Allis by its own acts (the injunction proceedings) had prevented Milwaukee from filing such schedule, and that confiscation would result. The result in the State Supreme Court has been above referred to.

B.

Reasons Relied On for the Allowance of the Writ.

The basis upon which petitioner contends that the Supreme Court of the United States has jurisdiction to review the judgment of the State Supreme Court and the reasons why the writ should be allowed are as follows:

1. That said judgment and mandate violates the provisions of the 14th Amendment of the Constitution of the United States in that petitioner has been deprived of its property without due process of law, contrary to said amendment, because the judgment of the circuit court was reversed and the case decided against petitioner without a trial upon the issue of fact in the trial court.

2. That the Supreme Court of the State of Wisconsin decided the merits upon facts not contained in the record and upon a theory which had never been tried by the litigants, and the petitioner has been deprived of its day in court, without a hearing in the trial court upon the point upon

which the case was decided against petitioner by said court; all depriving petitioner of its property without due process of law contrary to the 14th Amendment of the Constitution of the United States.

3. That Sections 196.19, 196.20 and 196.22, Wisconsin Statutes as construed by the Supreme Court of the State of Wisconsin in this case, are unconstitutional because they deprive petitioner of its property without due process of law, contrary to the 14th Amendment of the Constitution of the United States.

4. That the judgment or mandate of the Supreme Court of the State of Wisconsin confiscates the property of petitioner by allowing inadequate compensation for its use, contrary to the 14th Amendment of the Constitution of the United States.

5. The judgment of the State Supreme Court in reversing the judgment of the trial court based its decision upon matters which were not presented in the pleadings nor raised in the trial court. In the trial court it was understood (R. 468-469, 470-471) that the issue in the case related to the reasonable value of the services rendered and the case was tried upon that theory. Because the issue was not presented below, the petitioner did not have an opportunity to prove that no specific schedule was filed as to respondent because of the injunctions obtained by respondent. Petitioner was deprived of its day in court and of due process of law within the meaning of the 14th Amendment of the Federal Constitution, when the State Supreme Court decided the case against petitioner upon a point which was not tried because of justifiable reliance upon the action of the respondent at the trial. The case has been decided against petitioner without its ever having had the proper opportunity to present its evidence.

WHEREFORE, it is respectfuly prayed that a writ of certiorari be isued out of, and under the seal of, this Honorable Court directed to the Supreme Court of the State of Wisconsin commanding that court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case numbered and entitled in its docket No. 56, August Term, 1940, *City of Milwaukee, plaintiff-respondent* v. *City of West Allis, defendant-appellant*, and that said judgment of the Supreme Court of the State of Wisconsin may be reversed by this Honorable Court and the judgment of the trial court ordered affirmed, or that a new trial be granted in order to afford petitioner a proper opportunity to present its evidence upon the question of fact of which there was no trial in the court below and as to which there is no evidence in the record and upon which question of fact the Supreme Court of Wisconsin decided the case, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

CITY OF MILWAUKEE,
Petitioner,
By WALTER J. MATTISON,
City Attorney, Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Wisconsin Supreme Court is reported in 294 *N. W.* 625, decided November 8, 1940. See also record 448 for copy of opinion; and record 461 for order denying motion for rehearing, January 7, 1941.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b), Judicial Code, as amended by the Act of February 13, 1925, and March 8, 1934, 28 U. S. C. A. Sec. 344 (b).

The date of the judgment to be reviewed is November 8, 1940 (R. 448). Petitioner filed a motion for rehearing in the Wisconsin Supreme Court on the 14th day of November, 1940 (R. 460) within thirty days after the date of the decision as required by Rule 37 of the Wisconsin Supreme Court. This motion was denied on January 7, 1941 (R. 461).

The nature of the case and the judgment of the Wisconsin Supreme Court bring the case within the jurisdictional provisions of Section 237 (b), *supra*. The decision of the Wisconsin Supreme Court in reversing the judgment in favor of petitioner herein deprives petitioner of its property and rights without due process of law contrary to the provisions of the 14th Amendment of the Federal Constitution. The petitioner's claims of Federal constitutional right were specifically raised, set up and claimed in its brief upon the appeal at pages 93-101 (R. 478-483), and again in its brief upon its motion for rehearing at pages 51-53 (R. 483-484), and its brief in opposition to respondent's brief in opposition to the motion at pages 8-10 (R. 485-486). The State Supreme Court in its opinion (R. 454) upon the appeal specifically stated that no question of want of due process or other Federal question was involved. The order denying the motion for rehearing was without opinion, the Court stating that it was sufficiently advised of and concerning the motion (R. 461).

Petitioner could not specifically set up or claim the right under the Federal constitution earlier than in its brief upon the appeal, because the issue upon which the State Supreme Court decided the case was not presented in the case until in respondent West Allis' brief upon the appeal at pages 15-24 (R. 472-478). The issue was based upon the claim that because Milwaukee did not file a schedule of rates solely applicable to West Allis for services rendered after January 1,

1930, it could not collect anything for the services thereafter. At page 94 of petitioner's brief (R. 478), it was asserted that no such issue was raised by the answers nor at the trial of the case. At pages 100-101 of petitioner's brief (R. 482-483), petitioner claimed that Sections 196.19, 196.20 and 196.22 Wisconsin Statutes, were unconstitutional if construed to be applicable because the property of petitioner was taken without due process of law and for inadequate compensation, all contrary to the 14th Amendment of the Federal Constitution.

The rules of practice in the Wisconsin Supreme Court upon appeal, which rules we believe this Court will recognize, do not require the errors relied upon to be set out in the notice of appeal nor in the motion for rehearing,—Rule 37—but it is sufficient that they be stated in the briefs,—Rule 10, Wisconsin Supreme Court Rules; Section 251.264, Wisconsin Statutes, 1939. Under Rule 41, Section 251.41, Wisconsin Statutes, 1939, a motion for rehearing is deemed submitted upon the filing of the arguments in support of and in opposition to the motion. Thus, the motion includes not only the motion itself but all matters presented in the briefs upon the motion. The right claimed under the Federal constitution and relied upon was noticed, asserted and set up in petitioner's argument upon its motion for rehearing. The Court in denying the motion stated that it was sufficiently advised of and concerning the motion (R. 461).

At pages 51-53 of its argument, upon its motion for rehearing (R. 483-484), petitioner claimed that the judgment or mandate of the Wisconsin Supreme Court confiscated petitioner's property without having had a hearing or trial as to said issue first presented by respondent upon the appeal and by requiring the use of petitioner's property for inadequate compensation, all contrary to the 14th Amendment of the United States Constitution. Respondent, at page 13 of

its brief in opposition to petitioner's motion for rehearing (R. 484-485), denied petitioner's claim of right under said constitutional provisions. At pages 8-9 of petitioner's reply to the argument in respondent's brief (R. 485-486), petitioner again reasserted its claim that the decision of the Court took petitioner's property without due process of law, because there was no hearing upon the issues first presented upon the appeal and upon which the court based its decision.

The act complained of is the act of the Wisconsin Supreme Court in reversing the judgment upon an issue not presented nor tried below, another issue having been stipulated at the trial. This act occurred unexpectedly at the end of the proceeding when petitioner no longer had any right to add to the record. The Federal rights involved and claimed appear upon the face of the record. There was no proof as to the issue upon which the Wisconsin Supreme Court determined the case.

After the Wisconsin Supreme Court denied the motion for rehearing, the petitioner also brought the claim of constitutional right to the attention of that court in its assignment of errors upon which it based its application for a stay pending its petition for a writ of certiorari from the United States Supreme Court (R. 462-464).

The Federal rights claimed by petitioner are that Sections 196.19, 196.20 and 196.22, Wisconsin Statutes, as construed by the Wisconsin Supreme Court in this case, are unconstitutional as applied to petitioner in denying it due process of law under the 14th Amendment of the United States Constitution; and that the judgment of the Wisconsin Supreme Court based upon an issue of fact not presented below deprives petitioner of its property without a hearing and without due process of law and contrary to said 14th Amendment.

The first of these claims is based upon the contention that petitioner was required to render service upon demand and was entitled to reasonable compensation for the services so rendered. Its property is as effectually confiscated by requiring a use thereof for inadequate compensation as by a taking of the property for less than its true worth. By applying the provisions of Sections 196.19, 196.20 and 196.22, Wisconsin Statutes, during a period when petitioner was enjoined from changing the rate, the judgment deprives petitioner of its property without due process of law. The second claim of the denial of a Federal right is based upon the undisputed record (R. 468-469), wherein it was at the trial stipulated, in effect, that the issue in the case was the reasonable value of the service and the judgment of the Wisconsin Supreme Court reversing the judgment upon an issue of fact, to-wit, the absence of a specific filed schedule as to West Allis for services after January 1, 1930, which was not presented below, and as to which and the reason for such absence, the petitioner had no hearing as required by the 14th Amendment of the Federal Constitution.

The following cases, among others, it is believed, sustain the jurisdiction of this Honorable Court:

United States v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416;

Hulbert v. *Chicago*, 202 U. S. 275;

Lutcher & Moore Lumber Co. v. *William H. Knight et al*, 217 U. S. 257;

Home Telephone & Telegraph Co. v. *Los Angeles*, 227 U. S. 278;

Saunders v. *Shaw*, 244 U. S. 317;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;

Moffat Tunnel Improvement Dist. v. *Boynton*, 287 U. S. 620;

Snyder v. *Massachusetts*, 291 U. S. 97, 128;
Woodring v. *Clarksburg-Columbus Short Route Bridge Co.*, 301 U. S. 679.

III.

Statement of Case.

A full statement of the case has been set out under Heading "A" in the petition and consequently is not repeated here in the interest of brevity.

IV.

Opinion Below.

The decision of the Supreme Court of Wisconsin is based upon the theory that because no specific schedule was filed as to West Allis after the termination of the contract on January 1, 1930, there could be no recovery for the services rendered.

City of Milwaukee v. *City of West Allis*, 294 N. W. 625.

The court bases this conclusion upon a prior decision,

Kilbourn City v. *Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499,

in which case it announced the doctrine that it was up to a public utility to file a rate with the Railroad Commission or there could be no recovery for the services rendered. However, in that case no injunction nor stipulation as to issues were involved, and there has been a substantial change in the statute concerned.

V.

Specifications of Errors.

The Wisconsin Supreme Court erred:

1. In holding that the rates which were filed were not applicable to West Allis.

8. In failing to hold that because of the injunction and the stipulation as to issues, West Allis could not assert the claim that no specific schedule was on file as to it after January 1, 1930.

3. In deciding the case upon an issue or theory not presented below and upon which petitioner had no opportunity to be heard because of the stipulation and because not presented below.

4. In holding that the petitioner was not entitled to recover upon the basis of the reasonable value of the services rendered as found by the trial court.

ARGUMENT.

Summary of Argument.

A. The judgment of the Supreme Court of Wisconsin rendered without a trial upon the issue of fact in the trial court deprives petitioner of its property without due process of law.

B. Issue upon which Wisconsin Supreme Court decided the case was not raised at trial. That issue related to the filing of a schedule of rates as to West Allis for services rendered after January 1, 1930. This was not presented below and the case was not tried on that theory. Petitioner was precluded from showing that no specific schedule was filed because of injunction obtained by respondent.

C. It was conceded and, in effect, stipulated at the trial that the issue was the reasonable value of the services rendered in furnishing water to West Allis from January 1, 1930, and that petitioner was entitled to recover the excess, if any, over the amount paid at the six cent rate. The effect of the stipulation and of the action of the Wisconsin Supreme Court deprived the petitioner of the right and proper opportunity to present evidence upon the issue.

D. Consumer of public utility should pay reasonable value for services rendered where after termination of formal contract utility cannot change rate. Petitioner could not strictly comply with statute as to filing schedule because injunction prohibited it from collecting more or changing status.

E. After termination of a contract rate a consumer who demands and accepts service having enjoined an increase in rates is liable for the reasonable value thereof. Petitioner went as far as it could, in view of the injunction, in filing rates for water furnished for any purpose outside its city limits. To have filed a specific rate as to West Allis after January 1, 1930, would have changed the status because at that time all that was required to increase a rate was to file the same.

F. A municipally owned water utility is entitled to reasonable compensation for services rendered. Trial court's findings as to reasonable value are supported by sufficient evidence. Judgment of Wisconsin Supreme Court, and statutes as construed by it, take petitioner's property without due process of law;—without a fair hearing and without just compensation.

A.

Judgment of Supreme Court of Wisconsin rendered without a trial upon the issue of fact in trial court deprives petitioner of its property without due process of law.

This Court has jurisdiction to review the Federal question presented in this connection and set aside the decision of the Supreme Court of Wisconsin, because that Court entertained original jurisdiction of a question of fact, of which there was no trial below, and as to which there was no evidence in the record. A litigant is deprived of his day in court and of due process of law when an appellate court decides a case upon a point which was not tried because of justifiable reliance upon conduct or a stipulation by opposing counsel.

United States v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416;

Lutcher & Moore Lumber Co. v. *William H. Knight*, 217 U. S. 257;

Saunders v. *Shaw*, 244 U. S. 317;

Willing v. *Binenstock*, 302 U. S. 272;

Helis v. *Ward*, 308 U. S. 365.

Among the grounds upon which the writ is asked is that a new trial should be granted in order to afford petitioner an opportunity to present its evidence upon the issue upon which the Wisconsin Supreme Court decided the case, being upon a theory which had never been tried by the litigants.

Statements of fact erroneously made and having no foundation in the record should not be accepted as concluding petitioner's constitutional right to a trial before a court of competent jurisdiction, according to the regular and established course of judicial proceedings.

Creswill v. *Grand Lodge, K. P. of Georgia*, 225 U. S. 246;

North Carolina R. Co. v. *Zachary*, 232 U. S. 248;

Carlson v. *Washington,* 234 U. S. 103;
Interstate Amusement Co. v. *Albert,* 239 U. S. 560;
Saunders v. *Shaw,* 244 U. S. 317.

B.

Issue upon which Wisconsin Supreme Court decided case was not raised at trial.

In previous actions between the parties, reported in 217 Wis. 614, 621, the Wisconsin Supreme Court had held that petitioner was entitled to recover the excess, if any, of the reasonable value of the services rendered by petitioner to respondent after the termination of the contract on January 1, 1930, over and above the amounts paid by respondent at the six cent rate. The instant action was to recover such excess. The case was tried upon the basis of reasonable value. The issue that there could be no recovery because no specific schedule as to respondent had been filed by petitioner with the Railroad Commission or Public Service Commission was not presented in the pleadings nor at the trial and the case was not tried upon that theory.

Previous to its decision in the instant case, the Wisconsin Supreme Court refused to consider and dispose of questions on appeal which were not properly nor in a timely manner presented for determination of the trial court, and where the questions of law, not raised below, involved factual elements not presented below nor brought to the attention of the trial court.

Herro v. *Heating & Plumbing F. Corp.,* 206 Wis. 256;
Marshall & Ilsley Bank v. *Voigt,* 214 Wis. 27.

Only recently in the case of *Lisbon Town Fire Ins. Co.* v. *Tracy,* 296 N. W. 126, decided February 4, 1941, did the Wisconsin Supreme Court again hold that questions not raised and properly presented for review in trial court will not be reviewed on appeal, the court saying at p. 130:

"On these appeals defendants assert, for the first time, that plaintiff failed to comply with provisions in section 202.11(2), Stats., and in Article 6 of its policies in relation to the contents of notices required to be given by publication in a newspaper and also by mail to each member. As no issue in respect to the contents of those notices was raised by the pleadings or litigated on the trial, the belated contentions of the defendants in that respect will not be entertained on these appeals."

The Wisconsin Supreme Court held in the case of *Wisconsin Power & Light Co.* v. *Beloit,* 215 Wis. 439, at 444, that it may take judicial notice of public service commission files. The effect of a court taking judicial notice of a fact relieves the party who had the burden of proving the same from the necessity of introducing evidence as to such fact. Judicially noticing facts is but a rule of evidence and the party affected adversely by the facts noticed should be permitted an opportunity to introduce evidence to disprove them. That a court will take judicial notice of certain things does not preclude nor deprive the opposite party of an opportunity to rebut the same. Respectable authority elsewhere has reached the same conclusion.

Timson v. *Manufacturers' Coal & Coke Co.,* 220 Mo. 580, 119 S. W. 565, 569.

The Wisconsin Supreme Court took judicial notice of the files of the Public Service Commission, but from January 1, 1930 to April 4, 1935, those files did not contain a schedule of rates specifically applicable to respondent, other than the rate applicable to water used outside the city limits for any purpose by non-contract users (Ex. 14A; R. 329). Petitioner did not have its day in court upon those facts. While the state supreme court may take judicial notice of what is in the files of the Public Service Commission, it should not take such notice of matters not therein contained, because

in so doing the litigant is deprived of his day in court to show why the matter was not in the files. Thus, in the case at bar petitioner was precluded from showing that no specific schedule was filed because of the injunction obtained by respondent.

Sections 196.19, 196.20 and 196.22 of the Wisconsin Statutes are set out in the appendix to this brief. The issue or theory that petitioner was not entitled to recover upon the basis of reasonable value of services rendered because no specific schedule as to respondent was on file from January 1, 1930 to June 7, 1931, and on file and approved after the effective date of Chapter 183, Section 2, Laws of 1931—June 7, 1931—was in no manner raised in the pleadings nor presented to the trial court. An examination of the record discloses no such issue.

C.

Conceded and stipulated at trial that issue was reasonable value of services.

Respondent's counsel conceded at the trial that petitioner was entitled to recover for reasonable value of services if more than six cents per hundred cubic feet. It was conceded that the decision in 217 Wis. 614 made *res judicata* the question that the petitioner was entitled to recover the reasonable value of the service (R. 469).

What is admitted or conceded to be the law by a party at the trial of an action is binding upon him, and if it is accepted by the other side it becomes the law of the particular case. Respectable authorities elsewhere have reached the same conclusion.

Baltimore, etc. R. Co. v. *Resley,* 14 Md. 424;
Sittig v. *Birkenstack,* 35 Md. 273.
Ward v. *Goetz,* 33 Cal. App. 595, 165 P. 1022.

For convenience we here repeat a portion of the proceedings appearing at record page 469. Petitioner's counsel had just offered into evidence the record in the injunctional case:

"Mr. Gram: May I ask, Mr. Drechsler, what the purpose of the offer is?

"Mr. Drechsler: The question of reasonable value of water is concerned, and there are cases that hold that where the utility is enjoined or cannot stop furnishing water that in those cases it is entitled to recover the reasonable value of the service rendered, and this complaint shows that attempt was made by West Allis to stop the city from shutting off the water, and in the complaint there are also allegations that this was the only source of supply that West Allis had for its water, and for other various reasons to establish its ground for injunction; *and the cases which I have cited show that where those things exist the utility is entitled to recover the reasonable value of the service.*

"Mr. Gram: *That question has all been determined res adjudicata so far as this action is concerned.*

"The Court: We will receive the complaint in that other action, unless you see some special reason for receiving more of that file than the complaint.

"Mr. Drechsler: I think that the complaint would be sufficient. That went up and the record in the Supreme Court is shown in 217 Wis. 614. I think that with the complaint would be ample for our purposes.

"The Court: We will receive the entire file. That will make short work of it. Whatever parts of it have direct bearing can be specially made part of our record if it becomes necessary for some reason.

"(Exception.)

"Mr. Gram: *I didn't consider that the question was open.*

"The Court: No.

"Mr. Gram: — *because of the Supreme Court decision, so I am not going to argue with Mr. Drechsler.*

"Mr. Drechsler.: *All right.*"

It should not be permitted that a defendant go to trial and let the case proceed to judgment upon a certain conceded issue or theory without any attempt to assert a certain defense, and then raise that question for the first time in the appellate court in which the adverse party cannot present evidence in opposition thereto. Applying this doctrine to the facts and circumstances previously stated, the effect of the action of the Wisconsin Supreme Court was to deny petitioner its day in court and petitioner was deprived of the right and the proper opportunity to present evidence upon the issue.

Lutcher & Moore Lumber Co. v. *William H. Knight et al,* 217 U. S. 257;
Saunders v. *Shaw,* 244 U. S. 317;
Snyder v. *Massachusetts,* 291 U. S. 97, 128.

D.

Consumer of public utility should pay reasonable value for services rendered where after termination of formal contract utility cannot change rate.

The effect of the decision in this case, if it is permitted to stand, is to bar a public utility from recovering for any services rendered by it to a consumer after a contract which fixed the rate has been terminated, even though the consumer has by injunction prohibited the utility from shutting off the service or changing the rate and the utility is required to furnish adequate service; the consumer has the option to accept or refuse the service, but the utility must furnish it, and cannot refuse to do so, yet the utility cannot recover adequate compensation for the services so rendered under compulsion. The unconstitutionality of such doctrine is here challenged.

On January 18, 1927, petitioner served upon respondent a notice and certified copy of a resolution to terminate the

contract entered into in 1905 on January 1, 1930 (Ex. E; R. 404).

On August 27, 1928, Milwaukee began an action against West Allis to recover the difference between the six cent rate paid and the schedule rate of ten cents (217 Wis. 614).

On December 28, 1929, the City of West Allis commenced an action against Milwaukee to enjoin Milwaukee from discontinuing water service to West Allis and from collecting any other amount than the six cent rate (217 Wis. 614). The record in that case was made a part of the record in the case at bar and is referred to at R. 468-469.

There was a temporary restraining order and after a trial, judgment was entered on February 28, 1934, by which Milwaukee was restrained from changing the rate from the six cent rate and from shutting off the water supply (217 Wis. 614). In view of that judgment the injunctional order which preceded it, the conduct of West Allis and what Milwaukee did to comply as far as it could with the statutes, the application of the rule of the case of *Kilbourn City* v. *Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N. W. 499, and of Section 196.22, Wisconsin Statutes, deprives petitioner of due process of law.

E.

After termination of a contract rate a consumer who demands and accepts service having enjoined an increase in rates, is liable for the reasonable value thereof.

A consumer is liable to pay for the water which it uses where it continues to accept or insist upon service after the termination of a formal contract. The failure of a water utility to file with a State commission the rate charged is not a bar to an action for the reasonable value of the service rendered where a sufficient effort to comply was made or the utility was by the conduct of the consumer

required to continue to furnish the service and could not change the rate.

In the case of *Quarles* v. *City of Appleton,* 299 Fed. 508, the court said at page 517:

> "Because the utility failed to file or include in its schedules the rates charged to the city, it is contended that no recovery can be had in this action. But what schedule could it file. For nearly six years it and the city had been in hopeless disagreement as to the rate chargeable. Failure to agree upon a basis of compensation was no more chargeable to one party than to the other. Plaintiff did seasonably inform the commission that the charge to the city was in dispute, and asked the commission to fix the rate which the city should pay. This, we think, was a sufficient compliance with the statute. No penalty for failure to file rates can or should be enforced, when the utility was unable to comply with this statutory requirement. Certainly neither party should be permitted to dictate what the terms of the contract should be, and when the parties, as in this case, were unable to agree upon a rate, failure of the utility to include in its schedules the charge thus in dispute should not be construed as such a failure to comply with the statute as forfeited its right to recovery."

In the case at bar the two communities had from 1926 at least been in disagreement as to the rate chargeable; West Allis claiming that the contract rate applied; Milwaukee claiming that the rate filed as to outside consumers applied. The Commission knew of the dispute, being a defendant in a suit concerning the rate schedule—*Milwaukee* v. *Railroad Commission,* 217 Wis. 606. The Commission understood that the city claimed that the schedule rates filed applied after the contract was terminated. If what the utility did by way of filing rates after January 1, 1930 (Ex. 14A; R. 329) was not a sufficient compliance with the Wisconsin Statute, Section 196.20, no penalty for failure to file the same can or should be enforced, when the

utility was unable to comply strictly with the statutory requirement. This resulted from the injunctional order, above referred to, obtained by West Allis from the Circuit Court for Milwaukee County which enjoined and restrained Milwaukee from doing anything which would change the then status between the parties.

The rates filed, which is as much as Milwaukee could do, it should be held, precluded the operation of Section 196.22, Wisconsin Statutes. If a specific rate was required to be filed as to West Allis, Milwaukee was prevented from filing such rate because of the injunction. To have filed such a rate on January 1, 1930, or thereafter, would have changed the status between the parties.

Milwaukee could not, in view of the injunction, file a specific schedule as to West Allis, for that would have changed the status between the parties. Section 196.20 as it existed from January 1, 1930, to the effective date of Chapter 183, Laws of 1931, merely required a filing of the schedule. Thus, a mere filing would have resulted in a violation of the injunction. In that, Milwaukee would have ignored the injunction and it and its officers participating would have been liable to the penalties flowing therefrom. Milwaukee did not ignore the injunction because nothing which it did during the duration thereof affected the status prior thereto. Milwaukee went as far as it could go in view of the injunction, and because of the injunctions, Sections 196.20 and 196.22 should not be applied; first, because of substantial compliance under the circumstances; and, second, because the injunctional proceedings excused strict compliance with the statute.

A party who was instrumental by injunctional action in preventing a compliance with the statutory requirements should not receive benefits thereof. Under such circumstances the failure of the utility to strictly comply with the statute should not be construed as such a failure as for-

feited petitioner's right to recovery; otherwise, petitioner is deprived thereof without due process of law.

Respectable authorities elsewhere reach a similar conclusion.

Quarles v. *City of Appleton,* 299 Fed. 508;
Staten Island Water Supply Co. v. *City of New York,* 128 N. Y. S. 1028;
People ex rel. Arthur et al., Fire Com'rs, v. *Huntington Water Works Co.,* 203 N. Y. S. 808;
People ex rel. City of New York v. *Queens County Water Co.,* 232 N. Y. 377, 133 N. E. 889.

It is submitted that these cases are correct on principle, and that the doctrine therein announced, particularly in *Quarles* v. *City of Appleton,* 299 Fed. 508, should be followed in the present case.

F.

A municipally-owned water utility is entitled to reasonable compensation for services rendered.

Petitioner as the owner and operator of a plant and equipment for furnishing water to or for the public is a public utility within the provisions of Chapter 196, Wisconsin Statutes.

Pabst Corporation v. *Milwaukee,* 190 Wis. 349.

As such it can challenge the constitutionality of the provisions of the public utility law as construed by the courts, the same as a private owner of such a utility could challenge the same.

Because the issue as to Sections 196.19, 196.20 and 196.22 of the Wisconsin Statutes was first presented upon the appeal, petitioner's first opportunity to question the constitutionality of the so-called forfeiture statute, Section 196.22, was in its brief at page 100 (R. 482).

Petitioner at all times had rates on file (Ex. 14A; R. 329); it was compelled to furnish the service and could not change the status as to rates or otherwise. That petitioner has not received reasonable compensation for the services which it rendered was recognized by the findings of the trial court, supported by sufficient evidence, as to the reasonable value of the services (R. 37-38).

As a result of the decision, the property of the petitioner will be confiscated without having had a hearing or trial as to the issues first presented by petitioner upon appeal. A fair hearing is one of the important and fundamental requisites of due process of law. Its property is as effectually confiscated by requiring the use thereof for inadequate compensation as by a taking of the property for less than its true worth. The just compensation assured a utility by the 14th Amendment of the United States Constitution is a reasonable return on the value of the petitioner's property at the time it was used in rendering the service. If a utility is required to operate at a rate which is not compensatory, its property is lost.

Pacific Gas & Electric Co. v. *San Francisco,* 265 U. S. 403;

Board of Public Utility Com'rs v. *N. Y. Tel. Co.,* 271 U. S. 23;

Smith v. *Illinois Bell Tel. Co.,* 282 U. S. 133.

A denial of rights given by the 14th Amendment need not be by legislation.

Home Telephone & Telegraph Co. v. *Los Angeles,* 227 U. S. 278;

Saunders v. *Shaw,* 244 U. S. 317.

It is submitted that the judgment of the Wisconsin Supreme Court, and the statutes as construed by it, take petitioner's property without due process of law, to-wit,

without a fair hearing and without just compensation therefor.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that a writ of certiorari should be granted and this court should review the decision of the Supreme Court of Wisconsin and reverse it to the end that petitioner's property will not be taken without due process of law, to-wit, without a fair hearing and without just compensation therefor.

Respectfully submitted,

WALTER J. MATTISON,
City Attorney,
Counsel for Petitioner.

APPENDIX.

Wisconsin Statutes, 1929.

Section 196.19 (1):

"Every public utility shall file with the commission schedules showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed the rates, tolls and charges in force April 1, 1907."

Section 196.20:

"*Changes of rates; ten days' notice.* No change shall be made in any schedule, except upon ten days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules ten days prior to the time the same are to take effect; provided, that the commission, upon application of any public utility, may prescribe a less time within which a reduction may be made."

Section 196.22:

"*Discrimination forbidden.* It shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in such schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect or receive any rate, toll or charge not specified in such schedule."

Wisconsin Statutes, 1939.

Sections 196.19 (1) and 196.22 remained the same as above quoted. Section 196.20 was amended by Chapter 183, Section 2, Laws of 1931, by creating subsection (2) of Section 196.20, reading as follows:

"(2) No change in schedules which constitutes an increase in rates to consumers shall be made except with the written approval of the commission, after an investigation and hearing."

INDEX

Subject Index

Page

The pertinent facts and issues considered by the Wisconsin Supreme Court 1-4

Argument

A municipal corporation has no privileges or immunities entitling it to invoke the Fourteenth Amendment of the Federal Constitution against the State creating it.... 4-7

Even if the petitioner was an individual or private corporation, no basis exists for the issuance of a writ of certiorari..... 7-11

Conclusion 11

Appendix 12

Cases Cited

Ballard vs Hunter, 204 U. S. 241..... 7

Board of County Commissioners of Barber County vs Peterson, 266 U. S. 591..... 6

Central Land Co. vs Laidley, 159 U. S. 103..... 8

Chicago & Alton RR Co. vs Kirby, 225 U. S. 155..... 8

Coleman vs Miller, 307 U. S. 433..... 5

Kennebunk, K. & W. Water Dist. vs Inhabitants of Wells, 128 Me. 256, 147 Atl. 188..... 11

Kilbourn City vs Southern Wis. Power Co., 149 Wis. 168..... 10

Milwaukee vs Railroad Commission, 217 Wis. 606..... 4

Milwaukee vs West Allis, 217 Wis. 614, 258 N. W. 851, 259 N. W. 724..... 3, 4, 7, 9

Milwaukee vs West Allis, 236 Wis. 371, 294 N. W. 625.. 3

Newark vs New Jersey, 262 U. S. 192..... 6

Pabst Corp. vs Milwaukee, 190 Wis. 349..... 3

Page

Rose's Notes on U. S. Reports, Vol. 10, 1932 Supplement. 6

Southern Ry. Co. vs Lewis & Adcock Co., 201 S. W. 131 8

Tracy vs Ginzberg, 205 U. S. 170 8

Trenton vs New Jersey, 262 U. S. 182 5

West Allis vs Milwaukee, 180 Wis. 512 3

Williams, Receiver of Washington, Baltimore & Annapolis RR. Co. vs Mayor and City Council of Baltimore, 289 U. S. 36 5

Worcester County Trust Co. vs Riley, 302 U. S. 292 7

STATUTES CITED

Section 196.19 (1), Wisconsin Statutes 2

Section 196.22, Wisconsin Statutes 2, 10

Section 196.66, Wisconsin Statutes 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 849

CITY OF MILWAUKEE

Petitioner

vs.

CITY OF WEST ALLIS

Respondent

BRIEF OF RESPONDENT, CITY OF WEST ALLIS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Wisconsin Supreme Court held that the petitioner as a public utility had failed to establish a cause of action under the Wisconsin Statutes for the period from January 1, 1930 to April 4, 1935. It ordered judgment against the respondent for the period from April 4, 1935 to June 30, 1939, upon the basis of a stipulation between the parties.

The pertinent facts and issues considered by the Wisconsin Supreme Court.

Both the original (R. p. 1) and the supplemental (R. p. 9) complaint of the petitioner, as the Wisconsin Supreme Court expressly held (R. p. 451), allege merely a cause of action on implied contract to recover the reasonable value of water furnished in excess of the amount voluntarily paid

by the respondent. However, the Wisconsin Public Utility Act, more particularly Section 196.22 of the Wisconsin Statutes (see Appendix), prohibits a public utility from recovering for services rendered in Wisconsin except pursuant to a rate specified in a schedule filed with the Public Service Commission. Section 196.19 (1) of the Wisconsin Statutes (see Appendix) also provides that the first rates filed by a public utility operating prior to April 1, 1907, "shall not exceed the rates, tolls and charges in force April 1, 1907." Neither the complaint nor the supplemental complaint contained an allegation with respect to the filing of a schedule of rates with the Public Service Commission, and the complaint admitted (R. p. 6) payment by West Allis at the rate in force between the parties from April 1, 1907, to January 1, 1930, to-wit, six cents per hundred cubic feet of water furnished. Manifestly the complaint was demurrable.

The action proceeded to trial. Without referring to the Wisconsin Statutes, judgment was entered by the trial court for the amount by which the reasonable value of the water furnished was found to exceed the amount paid by the City of West Allis at the contract rate in effect during the period from April 1, 1907, to January 1, 1930. This judgment was challenged on appeal. The record failed to disclose that petitioner had filed a schedule of rates applicable to the respondent, and at page 21 of petitioner's brief in support of its petition for writ of certiorari, petitioner concedes that the files of the Public Service Commission of Wisconsin from January 1, 1930 to April 4, 1935,

> "* * * did not contain a schedule of rates specifically applicable to respondent, other than the rate applicable to water used outside the city limits for any purpose by non-contract users (Ex. 14A; R. 329)."

The petitioner argued before the Wisconsin Supreme Court (R. pp. 478-483), as it now asserts here, that it was excused from compliance with the statutory conditions precedent to recovery in quantum meruit (1) by the decision in

Milwaukee vs. West Allis, 217 Wis. 614, 258 N. W. 851, 259 N. W. 724, which trial counsel for West Allis stated (R. p. 482) he considered was res adjudicata as to petitioner's right to recover in this action, and (2) because an injunction obtained by West Allis and involved in said former litigation allegedly prevented the petitioner from shutting off the water service to the respondent and also from filing a schedule of rates with the Public Service Commission. Respondent challenged each of these contentions.

As stated by the Wisconsin Supreme Court in the instant case (R. p. 452), the contention of the parties on appeal was as follows:

> "The defendant claims that the circuit court erred in proceeding at all to determine the reasonable value of the water furnished; that Milwaukee being a public utility, the charge for rendering service can only be fixed under the provisions of the utility law. The plaintiff claims that the decision of this court in the former case required the circuit court to proceed as it did."

Manifestly the petitioner's grievance is that because of the interpretation by the Wisconsin Supreme Court, of its former decision and of the injunction, petitioner's excuses for non-compliance with the Wisconsin Statutes were rejected. Petitioner re-asserted the same contentions in its motion for rehearing filed in the Wisconsin Supreme Court (R. pp. 485-486), but said motion was denied.

The decision in the instant case was rendered in the light of the following former decisions:

In January, 1921, while the West Allis water contract was still in force, petitioner sought arbitrarily and unilaterally to increase the water rate. The Wisconsin Supreme Court held that the petitioner could not do this. *West Allis vs. Milwaukee*, 180 Wis. 512.

In June, 1926, the petitioner's claim of authority to increase the water rates without complying with the Wisconsin Public Utility Act was rejected. *Pabst Corp. vs. Milwaukee*, 190 Wis. 349.

On December 9, 1926, a schedule of rates was approved by the Public Service Commission, and petitioner thereupon asserted that these rates applied to West Allis in spite of the existing water contract. On August 22, 1929, the Railroad Commission of Wisconsin (now the Public Service Commission) held that said 1926 rates did not apply to the respondent, City of West Allis. The petitioner took an appeal, and its claim was again rejected in *Milwaukee vs. Railroad Commission*, 217 Wis. 606.

On December 2, 1929, just four weeks before the termination of the West Allis water contract, the common council of the petitioner passed a resolution requiring a deposit of money from the respondent prior to January 1, 1930, "otherwise no water will be furnished" thereafter. (See full resolution, R. p. 338). It was pursuant to this notification that West Allis obtained the injunction which the Wisconsin Supreme Court set aside solely on the ground that, being a public utility, petitioner could not under the Wisconsin Public Utility Act terminate such service in this wise. *Milwaukee vs. West Allis*, 217 Wis. 614, 258 N. W. 851, 259 N. W. 724.

A municipal corporation has no privileges or immunities entitling it to invoke the Fourteenth Amendment of the Federal Constitution as against the state creating it.

It is manifest that no substantial Federal question is involved in the determination of the Wisconsin Supreme Court that petitioner failed to establish a cause of action under the provisions of the Public Utility statutes of the state of Wisconsin.

Pages 7 and 8 of the Petition for Writ of Certiorari discloses that each of the reasons relied on for allowance of the writ is predicated upon alleged violation of the rights of the petitioner under the Fourteenth Amendment of the Constitution of the United States.

The City of Milwaukee being an arm and creature of the State of Wisconsin is not protected as against the state statute under the Fourteenth Amendment of the Constitution of the United States. This proposition has been expressly affirmed by this court on innumerable occasions. Thus in *Williams, Receiver of the Washington, Baltimore & Annapolis RR Co., vs. Mayor and City Council of Baltimore*, 289 U. S. 36, at page 40, the court said:

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. *Trenton v. New Jersey*, 262 U. S. 182; *Newark v. New Jersey*, 262 U. S. 192; *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U. S. 539; *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, 390; *Railroad Commission v. Los Angeles Ry. Corp.*, 280 U. S. 145, 156."

This proposition was most recently reaffirmed by this court in *Coleman vs. Miller*, 307 U. S. 433, where this court said at page 441:

> "The principle that the applicant must show a legal interest in the controversy has been maintained. It has been applied repeatedly in cases where municipal corporations have challenged state legislation affecting their alleged right and obligations. Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator. *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394; *Trenton v. New Jersey*, 262 U. S. 182; *Risty v. Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378; *Williams v. Mayor*, 289 U. S. 36."

We especially refer this court to its decision in *City of Trenton vs. New Jersey*, 262 U. S. 182. There the State of New Jersey had recovered judgment against the City of Trenton for $14,310, being license fees imposed by a state statute for taking water from the Delaware river. The City asserted that the statute violated the contract clause of the

Constitution of the United States and took its property held in a proprietary capacity, in violation of the Fourteenth Amendment of the United States Constitution. A privately owned water company, the predecessor in title of the City of Trenton, had originally by contract obtained the right to take water from the Delaware River without limitation and without license fee, and the City of Trenton maintained that it had acquired the benefit of said contractual right when it acquired said water works system. This contention was rejected, the court saying:

> "The power of the state, unrestrained by the contract clause of the Fourteenth Amendment, over the rights and property of cities held and used for 'government purposes,' cannot be questioned. In *Hunter v. Pittsburgh*, 179, (207 U. S. 161) reference is made to the distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private or proprietary capacity, and decisions of this court which mention that distinction are referred to. In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the contract clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state." (Parenthetical matter inserted).

In a companion case, *Newark vs. New Jersey*, 262 U. S. 192, this court, citing cases, succinctly stated at page 196:

> "The City cannot invoke the protection of the Fourteenth Amendment against the State."

As disclosed in *Rose's Notes on U. S. Reports*, Vol. 10, 1932 Supplement, at page 157, this court has dismissed numerous cases for want of jurisdiction on the authority of *Trenton vs. New Jersey*, 262 U. S. 182, and its companion case, *Newark vs. New Jersey*, 262 U. S. 192.

In *Board of County Commissioners of Barber County vs. Peterson*, 266 U. S. 591, this court refused to review a decision of the Kansas Supreme Court reported in 113 Kan. 180, 213 Pac. 1054. The petitioning county had been denied

the benefit of a state guaranty fund for its county deposits. The state statute required that the interest rate on public moneys be (1) uniform throughout the county and (2) established by formal order of the Banking Commissioner as a condition precedent to participation in the state guaranty fund. The Commissioner of Banking knew of the rate of interest being paid on the county deposits by the insolvent bank and tacitly acquiesced therein. Review by this court was sought upon the ground that the decision of the Supreme Court of Kansas constituted a taking of the county's property without due process of law. However, this court dismissed the application for want of jurdisdiction.

Even if petitioner was an individual or private corporation, no basis exists for the issuance of a writ of certiorari.

We will take up seriatim and briefly point out the fallacies in each of the four specifications of error asserted by petitioner on page 17 of its brief in support of its petition for writ of certiorari.

1. Petitioner asserts the Wisconsin Supreme Court erred "in holding that the rates which were filed were not applicable to West Allis."

The decision of the Wisconsin Supreme Court so holding was filed April 2, 1935. *City of Milwaukee vs. City of West Allis,* 217 Wis. 614, 258 N. W. 851, 259 N. W. 724. In the instant case, Mr. Justice Fowler, after analyzing the earlier decision, stated (R. p. 455):

> "The holding of the former case that the orders of the Commission fixing rates for outside users did not apply to West Allis is res adjudicata."

We do not understand that this Court will review all alleged errors of the state courts or that this alleged error constitutes a basis for the issuance of a writ of certiorari. *Ballard vs. Hunter,* 204 U. S. 241, 258 (1907); *Worcester County Trust*

Co. vs. Riley, 302 U. S. 292 (1937), citing *Central Land Co. vs. Laidley*, 159 U. S. 103 (1895); *Tracy vs. Ginzberg*, 205 U. S. 170 (1907).

2. Petitioner asserts the Wisconsin Supreme Court erred "in failing to hold that because of the injunction and the stipulation as to issues, West Allis could not assert the claim that no specific schedule was on file as to it after January 1, 1930."

This issue was squarely presented to the Wisconsin Supreme Court both in the petitioner's brief prior to the original argument (R. pp. 478-483) and in its brief in support of motion for rehearing (R. pp. 485-486). It was considered by the Wisconsin Supreme Court and the contentions rejected.

Section 196.66 of the Wisconsin Statutes (see Appendix) provides for a forfeiture of not less than $25 nor more than $1,000 for violation of any provision of Chapter 196. The regulatory statutes of a state, particularly when penal in character, cannot be nullified by the doctrine of estoppel. 19 American Jurisprudence 804. In *Chicago & Alton RR. Co. vs. Kirby*, 225 U. S. 155, the railroad expressly undertook to expedite the shipment of horses from a point in Illinois to New York city without making a special charge for this additional service. In a suit for damages against the railroad company for delay, this court held at page 165:

> "An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be *published* in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance *without such publication* is a violation of the act." (Italics supplied).

See also *Southern Ry. Co. vs. Lewis & Adcock Co.*, 139 Tenn. 37, 201 S. W. 131.

So in the instant case, the Wisconsin Supreme Court refused to excuse the petitioner's failure to comply with the requirements of the Wisconsin Public Utility Act, which compliance was a condition precedent to recovery in this action.

The statement by trial counsel for West Allis that the former decision of the Wisconsin Supreme Court was res adjudicata with respect to the petitioner's right of recovery, on its face was nothing more than his conclusion as to the effect of said decision. However, the Wisconsin Supreme Court expressly ruled that (R. p. 453).

> "We are of opinion that the question of recovery of reasonable value was not within the issues of the former case, and the statement of our opinion that Milwaukee could recover on quantum meruit is not res judicata, and therefore not binding upon the parties or the circuit court."

As a matter of fact, the statement of the Wisconsin Supreme Court in its former decision was as follows:

> "If the city in a proper action can establish that the service rendered by it upon the basis of *quantum meruit* was worth more than the amount which it has received, it will be entitled to recover accordingly *unless precluded on other grounds.* Whether or not it is entitled to recover and the amount of recovery are judicial quistions." *City of Milwaukee vs. City of West Allis,* 217 Wis. 614, at page 619. (Italics supplied).

So far as concerns petitioner's second specification of error, there appears no basis for the issuance of a writ of certiorari.

3. Petitioner asserts the Wisconsin Supreme Court erred "in deciding the case upon an issue or theory not presented below and upon which petitioner had no opportunity to be heard because of the stipulation and because not presented below."

All the issues were fully presented by petitioner to the Wisconsin Supreme Court both before the original argument (R. pp. 478-483) and on rehearing (R. pp. 485-486). All the issues were propositions of law, namely, (1) did the former decision of the Wisconsin Supreme Court hold that the water rates for non-contract users was not applicable to the respondent, City of West Allis, (2) was the statement of respondent's trial counsel that he considered said ruling was res judicata so far as petitioner's recovery in this action was concerned, a

binding stipulation, and (3) did the injunction obtained by West Allis by its terms prevent the petitioner from filing a schedule of rates in accordance with the Wisconsin Public Utility Act, and, if so, did this excuse the petitioner for non-compliance with that act. Manifestly the only issue of fact in petitioner's claim (Petition, page 8, para. 5), namely, that it "did not have an opportunity to prove that no specific schedule was filed as to respondent *because of the injunctions obtained by respondent*" (Italics supplied), relates to the construction of the injunctional order.

The former decision of the Wisconsin Supreme Court did not need to be offered in evidence. The injunction was offered and received in evidence and was a matter as to which the Wisconsin Supreme Court could take judicial notice, it having been the subject matter of a former decision in that court. The so-called stipulation or statement of counsel as to the effect of the former decision of the Wisconsin Supreme Court was a matter of record and manifestly a conclusion of law.

We fail to perceive on what basis this court should issue its write of certiorari even though the Wisconsin Supreme Court *erred in its construction* of (1) its former decision, (2) the injunction or (3) the so-called stipulation.

4. Petitioner asserts the Wisconsin Supreme Court erred "in holding that the petitioner was not entitled to recover upon the basis of the reasonable value of the services rendered as found by the trial court."

The Wisconsin Public Utility Act, more particularly Section 196.22, expressly provides that it is unlawful for any public utility "to demand, collect or receive any rate, toll or charge not specified in such schedule." Many years ago the Wisconsin Supreme Court construed this statute in the case of *Kilbourn City vs. Southern Wis. Power Co.*, 149 Wis. 168, 135 N. W. 499, and held at page 185:

> "We think the legislature has in effect said to public utilities, you must file your schedule of rates, you must charge what the schedule provides, and you may not charge anything unless you comply with the law."

Ignorance of this decision, much less of the statute, is no excuse for petitioner's failure to comply with the statute.

However, Wisconsin is not alone in enforcing this regulatory provision. In the case of *Kennebunk, K. & W. Water Dist. vs. Inhabitants of Wells,* 128 Me. 256, 147 Atl. 188, a quasi municipal corporation which, under the statutes of Maine, constituted a public utility, took over the property of a water company. The water district continued to bill and charge the various municipal customers in the district at the old rate. In a suit to recover the same, the Supreme Judicial Court of Maine said at page 190:

> "The rates of the water company, if adopted by the trustees, were no longer those of the water company, but became on adoption those established by the district, and according to the plain intent of chapter 55, Rev. St., must be filed with the Utilities Commission, in order that they may be of public record, and be complained against by any person aggrieved thereby. *Until this is done, the courts will not enforce the recovery of them in a suit at law.* A utility has no right to furnish service to the public until it has complied with the provisions of chapter 55. Failure to do so subjects it to a penalty." (Italics supplied).

Conclusion

In view of the foregoing, the petition for writ of certiorari to the Supreme Court of the State of Wisconsin in the above entitled matter should be denied.

Respectfully submitted,

LOUIS QUARLES
MAXWELL H. HERRIOTT
JOHN C. DOERFER
Counsel for Respondent

APPENDIX

Section 196.19 (1), *Wisconsin Statutes*

"Every public utility shall file with the commission schedules showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed the rates, tolls and charges in force April 1, 1907."

Section 196.22, *Wisconsin Statutes*

"It shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in such schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect or receive any rate, toll or charge not specified in such schedule."

Section 196.66, *Wisconsin Statutes*

"(1) If any public utility shall violate any provision of chapter 196 or 197, or shall do any act therein prohibited, or shall fail or refuse to perform any duty enjoined upon it for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement or order made by the commission or the municipal council or any judgment or decree made by any court upon its application, for every such violation, failure or refusal such public utility shall forfeit not less than twenty-five dollars nor more than one thousand dollars.

"(2) Every day during which any public utility or any officer, agent or employe thereof shall fail to observe and comply with any order or direction of the commission or to perform any duty enjoined by chapter 196 or 197, shall constitute a separate and distinct violation."

APR 12 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS,

Respondent.

REPLY BRIEF OF PETITIONER

WALTER J. MATTISON,
City Attorney,
Counsel for Petitioner.

INDEX.

SUBJECT INDEX.

		Page
A.	A municipal corporation operating a public utility may invoke the Fourteenth Amendment of the Federal Constitution as against another municipal corporation in an action for an amount due for services	1
B.	Failure to file rate excused by injunction	2
C.	Issue as to compliance with Section 196.20 or applicability of Section 196.22 never litigated, either in former suit or in case at bar	3
Conclusion		3

TABLE OF CASES CITED.

Hormel, Jay C. vs. Guy T. Helvering, Com'r of Internal Revenue, 85 L. Ed. Adv. Op. 1940-1941 (1), p. 56 3

Kennebunk, K. & W. Water Dist. vs. Inhabitants of Town of Wells, 128 Me. 256, 147 A. 188 3

Kilbourn City vs. Southern Wisconsin Power Co., 149 Wis. 168, 135 N. W. 499 2

Milwaukee E. R. & L. Co. vs. Milwaukee, 209 Wis. 656, 245 N. W. 856 2

Pabst Corporation vs. Milwaukee, 190 Wis. 349, 208 N. W. 493 2

Table of Cases Cited—*Continued.*

	Page
Quarles vs. City of Appleton, 299 F. 508	2
State Journal Printing Co. vs. Madison, 148 Wis. 396, 134 N. W. 909	2
Strohmaier vs. Wisconsin Gas & Electric Co., 214 Wis. 564, 253 N. W. 798	2
Trenton, City of vs. New Jersey, 262 U. S. 182, 67 L. Ed. 937	1

WISCONSIN STATUTES CITED.

Section 196.20	3
Section 196.22	3

U. S. CONSTITUTION CITED.

Fourteenth Amendment	1

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 849

CITY OF MILWAUKEE,

Petitioner,

vs.

CITY OF WEST ALLIS,

Respondent.

REPLY BRIEF OF PETITIONER

The brief of respondent was received on April 8, 1941.

A.

A municipal corporation operating a public utility may invoke the Fourteenth Amendment of the Federal Constitution as against another municipal corporation in an action for an amount due for services.

Cases cited by respondent in its brief at pages 5-6 are inapplicable as the action at bar did not involve the state of the creation of petitioner. The case of *City of Trenton*

vs. New Jersey, 262 U. S. 182, 67 L. Ed. 937, strongly relied upon by respondent, was a case in which the municipality was sued by the state to collect a license fee.

Petitioner as the owner of a water utility is and was a public utility,—*Pabst Corporation vs. Milwaukee,* 190 Wis. 349, 208 N. W. 493,—operating such plant in its proprietary capacity and in such capacity having the same rights and liabilities as a privately owned utility.

State Journal Printing Co. vs. Madison, 148 Wis. 396, 134 N. W. 909;

Milwaukee E. R. & L. Co. vs. Milwaukee, 209 Wis. 656, 660, 245 N. W. 856;

Strohmaier vs. Wisconsin Gas & Electric Co., 214 Wis. 564, 253 N. W. 798.

It would be a sad reflection upon the law if in such circumstances a municipally owned and operated utility could not sue a consumer outside of its city limits, and recover for amounts due for services rendered, nor be entitled to the protection of the constitution against decisions of the appellate court below.

B.

Failure to file rate excused by injunction.

Petitioner was in no position to comply with the statutes as to filing rates because of the injunction. The injunction prevented petitioner from doing anything to change the rates. That distinguishes the case at bar from the case of *Kilbourn City vs. Southern Wisconsin Power Co.,* 149 Wis. 168, 135 N. W. 499 (referred to at pages 10-11 of respondent's brief) and makes applicable the rule of the case of *Quarles vs. City of Appleton,* 299 F. 508 (referred to at pages 25, 28 of petitioner's brief in support of its peti-

tion). A party who by his act prohibits compliance with a statute should not be heard to question such non-compliance.

No injunction was involved in the case of *Kennebunk, K. & W. Water Dist. vs. Inhabitants of Town of Wells,* 128 Me. 256, 147 A. 188 (referred to at page 11 of respondent's brief), which distinguishes that case.

C.

Issue as to compliance with Section 196.20 or applicability of Section 196.22 never litigated, either in former suit or in case at bar.

This subject has been previously covered (pages 20-22 of petitioner's brief), but in addition to the cases cited in petitioner's brief in support of its petition that a writ of certiorari will be granted if the appellate court decides the case upon an issue not presented below, we cite the case of *Jay C. Hormel, petitioner, vs. Guy T. Helvering, Com'r of Internal Revenue* (No. 257, October 14, 1940), 85 L. Ed. Advance Opinions 1940-1941 (1), page 56. In that case a petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit was granted by the United States Supreme Court.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

WALTER J. MATTISON,
City Attorney,
Counsel for Petitioner.